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‘Direct Democracy in the United Kingdom: Reflections from the Scottish Independence Referendum’

Stephen Tierney*

I. Introduction

On 18 September 2014 55% of Scots voted no to the proposition: ‘Should Scotland be an Independent Country?’. It was inevitable that during the campaign attention should be focused upon the likely outcome of the vote, major substantive issues of contention such as currency relations between an independent Scotland and the United Kingdom, and the ease or difficulty with which an independent Scotland would achieve membership of the European Union. In this article, however, I will assess the referendum *process* itself, seeking both to determine its democratic merits and to draw out lessons for future referendum design, particularly in the United Kingdom which already has an elaborate regulatory statute in the shape of the Political Parties, Elections and Referendums Act 2000 (PPERA).

Referendums have a bad name within political and constitutional theory. They are widely considered to be easily manipulated by political elites and incapable of fostering the meaningful deliberation of citizens. Rather than an asset to democratic decision-making, referendums are often perceived to be a threat to a healthy constitutional system.¹ I have argued elsewhere that the democratic deficiencies associated with referendums are principally issues of practice rather than principle and that a properly regulated referendum should be capable of overcoming these problems.² In particular, the recent turn in political theory and democratic practice towards deliberative democracy can assist in helping to build, through detailed legal regulation, a referendum that is capable of performing the task of engaging citizens in a meaningful act of republican deliberation.³ In this article I will use the Scottish independence referendum to test this hypothesis.

My central proposition is that the conditions surrounding the referendum in Scotland offered an ideal case study with which to assess how regulation can foster the deliberative engagement of citizens. First, it was organised within a healthy and fully-functioning democracy. Secondly, it was long in the planning: the Scottish Government announced its intention to hold a referendum in January 2012,⁴ some two and a half years before the vote itself, thus offering a lengthy span of time within which channels of deliberative participation

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¹ John Haskell, *Direct Democracy or Representative Government? Dispelling the Populist Myth* (Westview Press 2001).

² S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012).

³ Stephen Tierney 'Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox' (2013) *Election Law Journal* 1-17.

⁴ Scottish Government, ‘Your Scotland – Your Referendum – A Consultation Document’, 25 January 2012 <http://www.scotland.gov.uk/Publications/2012/01/1006>

might be fostered. Thirdly, the UK already had in place a model of referendum procedures which, *inter alia*, created an independent Electoral Commission and invested it with a detailed oversight role in UK referendums⁵; notably the existing UK legal regime was very influential in the framing of the Scottish referendum process. Fourthly, the referendum process was framed against, and given additional legal authority and political credibility by, the ‘Edinburgh Agreement’ between the UK and Scottish governments, the aim of which was to ensure the referendum delivered ‘a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect’.⁶ And finally, the referendum was regulated by two statutes passed by the Scottish Parliament - the Scottish Independence Referendum (Franchise) Act 2013 (‘the Scottish Franchise Act’), and the Scottish Independence Referendum Act 2013 (‘the Scottish Referendum Act’) - which together offered a comprehensive framework of rules and constraints.

II. The Referendum Pathology

Before turning to the deliberative qualities or deficiencies of the Scottish experience it is useful to explore further the perceived deficiencies of referendums in general. Referendums are paradoxical. From a positive perspective they seem to represent an ideal model of democracy. The voters speak as one unified people, deciding on an issue for themselves, rather than through the mediation of politicians. What could be more democratic? By this construction we see in the referendum the republican promise of democracy fulfilled; political equality is confirmed as citizens come together in a collective expression of popular sovereignty.⁷ But for others the referendum is a dangerous device because it in fact imperils democracy which can only be properly effected through exclusively representative institutions, and as a result the referendum is best excluded from processes of constitutional change. There are three main objections that inform the scepticism of this position: that referendums lend themselves by definition to elite control and hence manipulation by the organisers of the referendum (‘the elite control syndrome’); that there is an in-built tendency of the referendum process merely to aggregate pre-formed opinions rather than to fostering meaningful deliberation (‘the deliberation deficit’); and that referendums consolidate and even reify simple majoritarian decision-making at the expense of minority and individual interests (‘the majoritarian danger’).⁸ In this article I address the first two of these criticisms. Scotland is not a divided society with readily identifiable minorities whose interests are clearly imperilled by an exercise in majoritarian decision-making. Therefore, I will not try to draw wider lessons in relation to ‘the majoritarian danger’ from the Scottish referendum.

The elite control syndrome is the most prominent charge levelled at referendums. A recurring complaint is that referendums promise popular power, including control by the people over elites, but are themselves so open to manipulation as to belie that promise. In other words, even if popular influence on constitutional processes is a republican good, referendums do

⁵ Political Parties, Elections and Referendums Act 2000, Part 1.

⁶ *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, 15 October 2012 available at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>

⁷ V. Bogdanor, *The People and the Party System* (Cambridge: Cambridge University Press, 1981), 93.

⁸ S Tierney, “Constitutional Referendums: A Theoretical Enquiry” (2009) 72 *Modern Law Review* 360; S. Tierney, *Constitutional Referendums* n.2 above.

not deliver that influence. Behind this objection lies the presupposition that an executive has the opportunity to shape the referendum process in order to achieve its objectives. Among the tools that are frequently assumed to be at the disposal of elites are: the initial decision to stage the referendum in the first place, the power unilaterally to frame the question, and the capacity to determine the process rules by which the referendum will be conducted, rules which can then be shaped to play to the government's strengths, for example by manipulating funding and spending regulation. According to this critique, the government is virtually assured a successful outcome. As the Dutch-American political scientist Arend Lijphart famously put it, 'most referendums are both controlled and pro-hegemonic'.⁹

The second objection, which is largely based upon the assumptions of the first, is that public reasoning is absent from referendum processes. Representative government is a far better model of decision-making because it is designed in a way that causes elected politicians to cooperate and, in doing so, to offer reasons for their views. By contrast, informed reflection upon, and discussion of, the issues at stake are not required in referendum processes, and are accordingly absent.

What we find again undergirding this critique are a number of assumptions, themselves often founded upon stereotypes: referendums tend to be held quickly in response to a spontaneous political calculation made by government; voters are presented with an issue which they have not had time to learn about or debate; voter confusion can be exacerbated by a deliberately obscure question which in many cases pushes responses in a particular direction; and citizens with busy lives lack the time and the incentive to engage with the issue and even the ability to understand it. The result is that those who bother to vote do so in an uninformed way, without adequate reflection, deliberation or public discussion, largely following the cues set by the referendum's organisers.

I will test both of these objections, and the assumptions underpinning them, in the context of the Scottish process, seeking to draw out broader conclusions about the application of direct democracy within the UK constitutional system.

III. Problems of Practice not Principle?: Towards a Deliberative Referendum

The issues which concern democratic theorists are certainly very real but they are concerns founded upon assumptions, the salience of which diminishes in the face of careful referendum design and adequate regulation. Consequently, the theory and practice of deliberative democracy, in which great strides have recently been taken in finding new ways in which to engage the popular participation of citizens in democratic decision-making, offers a vehicle with which to introduce good practice in referendums.

Deliberative democracy is now a well-established school, the emergence of which is often traced back to John Rawls' focus upon 'public reason'.¹⁰ This field of scholarship has taken many directions and is now advocated by political theorists across the ideological spectrum.¹¹

⁹ Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press 1984), 203. See also Matt Qvortrup, 'Are Referendums Controlled and Pro-hegemonic?' (2000) 48 *Political Studies* 821.

¹⁰ John Rawls, *Political Liberalism* (Columbia University Press, 1993).

¹¹ John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and Contestations* (Oxford University Press 2000).

A notable division of labour is between those who reflect upon a deliberative approach to politics through the abstraction of political theory¹² and those who seek to deploy deliberation in practical experiments in democratic decision-making.¹³ It is the latter area of scholarship which offers practical lessons for referendum design and it is here in particular that we can draw out wider lessons of good practice from the Scottish experience.

What is often missing from the political science, however, is the specific role law can play in supplying in a practical way the necessary regulation needed to facilitate deliberation. The effective regulation of the referendum process can work to diminish the elite control critique as I will explain below, but it is also the case that by implementing the principles of deliberative democracy within such a regulatory regime that avenues can be opened up to engage the public better, thereby overcoming the deliberation deficit. In other words, if regulation is itself based upon the deliberative principles of popular participation as a good and public reasoning as a realisable republican goal, then it is possible to develop electoral law and models of regulation in the construction of a ‘deliberative referendum’.¹⁴ Efforts should be focused upon mobilising levels of popular participation in terms of voter turnout, but also upon the *quality* of that participation. If a referendum is to overcome the elite control and deliberation deficit criticisms it must be shown that it offers a meaningful space for an exercise in collective public reason by citizens who understand an issue, engage with it, and are able to make an informed decision relatively free from elite-led influences and pressures.

How then did the Scottish referendum measure up against these benchmarks? I will focus upon the three central elements of the Scottish process which, I argued above, go to the heart of the elite control syndrome and deliberation deficit: the initiation power, question-setting and process regulation, asking how well the Scottish model worked, and what broader lessons can be drawn for other regulatory regimes, particularly that of the United Kingdom, as they seek to limit elite control and encourage popular participation throughout the referendum process.

i. The Initiation Power: Dispersing Elite Control

In a sense any referendum is ‘elite-controlled’, as indeed is any electoral process, if this is taken to mean organised by the established institutions of the state. The central issue is how this power is allocated among institutions. The feature that tends to set alarm bells ringing is where the organisation power in a referendum rests exclusively in the hands of the executive without a meaningful role for the legislature or for any level of independent oversight.

The first issue is the decision to set the referendum itself. Some countries, for example Australia and Ireland, offer constitutional regulation of the initiation power; a referendum is a

¹² Emily Hauptmann, ‘Deliberation = Legitimacy = Democracy’ (1999) 27 *Political Theory* 857; Simone Chambers, ‘Deliberative Democratic Theory’ (2003) 6 *Annual Review of Political Science* 307.

¹³ John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (OUP 2006); Robert Goodin and John Dryzek, ‘Making Use of Mini-Publics’ in Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford University Press 2008); Shawn Rosenberg (ed), *Deliberation, Participation and Democracy: Can the People Govern?* (Palgrave Macmillan 2007); Janette Hartz-Karp and Michael K Briand, ‘Institutionalizing Deliberative Democracy’ (2009) 9 *Journal of Public Affairs* 125; James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (OUP 2009).

¹⁴ Tierney, *Election Law Journal*, n3 above.

legally required part of the constitutional amendment process. By contrast the UK leaves the initiation of referendums to the discretion of the central government as we seen in the referendums of 1975, 1979, 1997, 1998 and 2011 (Table 1).

Referendums in the United Kingdom

Place	Date	Issue	Turnout	Result
Northern Ireland	8 March 1973	Remain part of the UK	58.7	Approved: 98.9
Northern Ireland	22 May 1998	Belfast Agreement	81.1	Approved: 71.1
Scotland	1 March 1979	Creation of a Scottish Assembly	33	Approved: 52 (did not meet threshold)
Wales	1 March 1979	Creation of a Welsh Assembly	58.8	Not approved: 79.7
Scotland	11 September 1997	1. Creation of a Scottish Parliament. 2. Devolution of limited tax-varying powers	60.4	1. Approved: 74.3 2. Approved: 63.5
Wales	18 September 1997	Creation of a National Assembly	50.1	Approved: 50.3
England (London)	7 May 1998	GLA and Mayor	34.6	Approved: 72
England (North East)	4 November 2004	North East England regional assembly	47.8	Not approved: 78
Wales	3 March 2011	Devolution of further powers to the National Assembly	35.4	Approved: 63.5
Scotland	18 September 2014	Independence	84.7	Not approved: 55.3
United Kingdom	5 June 1975	Continued EC membership	64.5	Approved: 67.2
United Kingdom	5 May 2011	Electoral System: Alternative Vote	42.2	Not approved: 67.9

Table 1

This has led to referendums being used for party political purposes. For example, in the early 1970s the Labour Party feared that a damaging split could emerge over membership of the EEC and decided that a referendum would help avoid this by allowing a free vote for MPs including ministers. James Callaghan described the referendum as ‘lifeboat’ into which the party was climbing in order to see off the danger of fission.¹⁵ Labour returned to the referendum in similar circumstances in relation to devolution. Proposals put forward in 1976 for assemblies for Scotland and Wales were widely opposed within the party. Vernon Bogdanor comments that the promise of a referendum which accompanied these proposals ‘was a device that would enable Labour backbenchers opposed to devolution nevertheless to vote for it in the House of Commons while campaigning against it in the referendum.’¹⁶ The bill was in the end withdrawn in March 1977. But when it was revived in 1977-78 referendums were again proposed and these were held in 1979. Again Bogdanor points to how the 1979 referendums were used ‘to defuse an issue.’¹⁷

The AV referendum in 2011 was also instigated for party political reasons. The decision to hold a referendum on this issue was the result of a political deal by the two parties forming the coalition government in 2010. In a similar way we must also see the Conservative Party promise of a referendum on EU membership, planned to take place in the event of victory in the election of May 2015. This is again a political device, in this case to confront the UKIP threat and to shore up a potential split in the Conservative party; the latter motivation bearing clear parallels with the 1975 referendum.

The initiation of the Scottish referendum was similar in being a policy proposal of the government of the day, stemming from an SNP manifesto commitment ahead of the 2011 Scottish parliamentary election. However, beyond the initial policy initiative it became clear very quickly that the power actually to organise a referendum was shared between the UK and Scottish governments, thus dispersing this crucial area of control.

To be sure of its lawful competence to organise the referendum through the Scottish Parliament, the Scottish Government concluded the Edinburgh Agreement¹⁸ with the UK Government. This gave the UK Government a handle also on the initiation power and hence some input into the referendum process and how it would be delivered. This had two clear advantages from the perspective of diluting elite control. First, the control of the referendum was subjected to public debate; secondly, the Scottish Government’s discretion in setting the question and important process rules such as funding and spending was tightly circumscribed, requiring each of the two governments to subject their preferences to the deliberative scrutiny of the other, as well as to public and media debate.

¹⁵ David Butler and Uwe Kitzinger, *The 1975 Referendum* (Macmillan Press, 1976), p.282.

¹⁶ Vernon Bogdanor *The People and the Party System The Referendum and Electoral Reform in British Politics* (Cambridge: Cambridge University Press, 1981), p.42.

¹⁷ *Ibid* p.45.

¹⁸ n.6 above. This, and the associated ‘memorandum of agreement’, provided that the referendum should have a clear legal base; be legislated for by the Scottish Parliament; and be conducted so as to command the confidence of parliaments, governments and people. This was formalised by an Order in Council (per Scotland Act 1998 s30) which devolved to the Scottish Parliament the competence to legislate for a referendum on independence which had to be held before the end of 2014. Scotland Act 1998 (Modification of Schedule 5) Order 2013, para 3. <http://www.legislation.gov.uk/ukSI/2013/242/made>

In this respect the Scottish referendum bears healthy comparison with UK-wide referendums which are instigated solely by the central government, often for internal party purposes. But since the dispersal of power in the Scottish case was a direct consequence of the limited devolved powers of the Scottish government, it is hard to see any obvious lessons for the far more powerful UK government supported by a sovereign parliament. Should a future UK government seek to organise a referendum on EU membership it will not be subjected to the types of controls which faced the Scottish Government in the course of 2012-13.

Given that this is the case, are there others ways in which the near complete discretion which the UK government enjoys in relation to referendums can be reined in? In the first place, it is the case that the UK government's power hinges also on Parliament's cooperation. Parliament has a role in legislating for each specific referendum, setting out specific process rules to supplement the general regulatory regime contained in PPERA. But as we see, certainly in relation to the referendum on the Alternative Vote system in 2011, this was in effect a rubber-stamping exercise with no real scrutiny of why the referendum was being held, whether it was a good idea or whether it was likely to stimulate public interest.¹⁹ It is clear from the turnout (42.2 per cent) and the result (68 per cent voted No and 32 per cent voted Yes) in 2011 that many people did not view the AV proposition as an important issue, something which should have been clear to parliamentarians; instead the majority of them accepted the referendum as a permissible outcome of the coalition deal. In a system of parliamentary government such a level of executive control is perhaps inevitable, but it does raise the question whether the UK needs more systematic legal regulation of the initiation power.

Partly to address this level of executive discretion, in 2010 the House of Lords Constitution Committee conducted an inquiry into referendum use in the UK, and one of the targets for those giving evidence to the Committee were the circumstances surrounding the AV referendum.²⁰ The Committee in its report recognised the lack of any over-arching legal or constitutional regime to regulate decisions on whether or not to hold a referendum, and on what issues. The Committee took the view that if referendums are to be a feature of UK political life they should only be held for specific purposes of the highest constitutional significance. It also went on to consider whether and if so how these purposes might be regulated by legislation. The Committee first sought to categorise those 'fundamental constitutional issues' in relation to which referendums might be appropriate, while also observing the considerable difficulties in defining such a term.²¹ Its non-exhaustive list included proposals: 'To abolish the Monarchy; To leave the European Union; For any of the nations of the UK to secede from the Union; To abolish either House of Parliament; To change the electoral system for the House of Commons; To adopt a written constitution; and To change the UK's system of currency.'²² In its conclusions the Committee remained sceptical of referendums (as a parliamentary body that is scarcely surprising), but it did recognise that the level of demand for referendums is growing and that the question of

¹⁹ Hence the very straightforward passage through Parliament afforded to the Bill which would become the Parliamentary Voting System and Constituencies Act 2011.

²⁰ 'Referendums in the United Kingdom', House of Lords Select Committee on the Constitution Report with Evidence, HL Paper 99, 2009-10, Minutes of Evidence.

²¹ House of Lords Report Chapter 6 Conclusion, para 206.

²² House of Lords Report Chapter 7 Summary of Recommendations, para 210.

defining which changes are so fundamental as to require a referendum does need to be addressed. However, in the end it concluded that each decision should in fact be left to Parliament on a case by case basis in recognition both of Westminster's legislative supremacy and of the essentially political nature of the decision at stake.

No legislation has followed from this report and we are left with the situation within which referendums remain largely a political tool at the hands of government. Having said that, with the wave of constitutional reform since 1997 we have also seen a gradual growth in piece by piece regulation of the initiation power, with the referendum enshrined in law as a prerequisite for certain forms of constitutional change, particularly in the devolution context. For example, the Northern Ireland Act 1998 (s1) confirms that 'Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland' voting in a referendum. The reunification of Ireland is not possible under this statute without a referendum, although an executive role remains since the initiation of the referendum is at the discretion of the Secretary of State for Northern Ireland. The Government of Wales Act 2006 also confirmed the need for a referendum on further devolution for Wales, a provision which resulted in the Welsh referendum in 2011,²³ and the Wales Act 2014 also provides for a referendum on whether its income tax provisions ought to come into force.²⁴ Another important initiative is the European Union Act 2011 which requires that a referendum be held on any significant amendments to the EU treaties.²⁵

Of course each of these provisions could be repealed by Parliament (indeed s18 of the European Union Act, which reiterates the principle of the sovereignty of Parliament, reminds us of this power). But as things stand, each of these provisions restricts executive discretion, and in political terms at least it would be very difficult for these provisions to be removed by Parliament.

Such regulation, however, remains confined to a very few cases and the overall UK approach to referendum initiation remains ad hoc. But I would argue that this in itself is not necessarily problematic in democratic terms. Direct democracy does not stand alone, separate from representative democracy. In reality the two always co-exist, with the institutions of the latter providing the regulatory framework for the former. The fact that Parliament is laying down referendum requirements on a case by case basis, for very specific issues, suggests a certain responsiveness to the public demand for greater direct democracy. This development is in part the outcome of a broader debate, often involving civil society, about the process as well as the substance of constitutional change. This is certainly the case in relation to referendum requirements now embedded in the devolution statutes for Northern Ireland and Wales. And this approach, responding to specific public interest in particular issues, may well be a more appropriate and practically effective approach than a general statute which attempts to circumscribe every eventuality across the constitution that might require a referendum.

We see this when we consider the alternative possibilities. I have noted that some states build the referendum into the standard constitutional amendment process, triggering direct democracy automatically in the event of certain constitutional circumstances arising. But

²³ Government of Wales Act 2006 Part IV.

²⁴ Wales Act 2014, s12.

²⁵ European Union Act 2011, s.4.

such an attempt to set out definitively when a referendum must be used can be fraught with difficulties. First, it is no easy matter to set out the issues about which a referendum must be held. For example, if Parliament were to say any change to the devolution settlements needs a referendum this could include minor and incremental changes when there is no appetite among the broader public to vote directly on what appears an insignificant or technical matter. Such over-regulation can also result in perverse incentives. One danger is that the government of the day would seek either to create the conditions for a referendum or to avoid these arising, depending on the political benefits or costs it associates with a referendum. Another risk is the avoidance of important decision-making because of the threat of a referendum on the issue. Also, how would such a general provision be structured? Would it be conclusive as to the use of referendums – in effect barring the use of direct democracy in other contexts, even those unforeseen at the time of enactment? Or would it leave open discretion for referendums in other circumstances. If the latter, it is hard to see what the point of such a statute would be; if the former, it is hard to see how such an endeavour would be meaningful in light of Parliament's legislative sovereignty.

Nonetheless, it can be argued that the symbolic significance of such legislation should not be dismissed out of hand. It would serve to indicate that without a subsequent statute repealing the referendum provision Parliament would not be able to change fundamental parts of the constitution without the direct voice of the people being listened to, and it would also give citizens advance notice of when a referendum is likely to be held and on what issues. This in turn would seem to boost the opportunities for citizen participation and deliberation in the area of constitutional change, and make decisions to hold such referendums decisions of principle not political opportunism.

However, another objection is that such a general law could juridify unnecessarily what is a very political issue. There would be the potential of legal disputes concerning whether such circumstances have in fact arisen. This can be a difficult and controversial area for judges, as we have seen in Ireland where the Supreme Court has had to adjudicate on whether the conditions are in place for a referendum.²⁶ A provision intended to facilitate popular participation could find itself the subject of even more abstract elite control in a dance between government and courts, which may draw the latter into an unnecessary level of political contention.

In my view the current trajectory is probably the correct one for the particular circumstances of our unwritten and informal system of parliamentary government. Certain issues find themselves subject to referendum lock and other issues, such as independent statehood for a part of the UK, in practice now also require a referendum. The gradual development of a more semi-formalised approach to the initiation trigger is reducing elite control across a number of issues, but also avoids the perils of excessive prescription and the risk that many relatively trivial matters would find themselves the subject of a referendum or the subject of a lengthy court dispute. In the end there is much to be said for the current British situation

²⁶ Although the Irish constitution provides for the use of a referendum for constitutional amendments (Constitution of Ireland, art 46), it was for a time not altogether clear that the ratification of every new European Community treaty constituted a constitutional amendment until an important case in 1986 when the Supreme Court ruled that further transfers of constitutional powers to the EEC amounting to changes to the 'essential scope or objectives' of the EEC would require constitutional amendment and a consequent referendum. *Raymond Crotty v. An Taoiseach and Others* [1987] IESC 4. See also Gavin Barrett, 'Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence' (2009) 5 *European Constitutional Law Review* 32.

where the use of referendum is for the government to justify both in election manifestos and to Parliament, providing the latter does its job and properly scrutinises not only the process of the referendum but also the underlying justification for taking a particular issue directly to the people and the way in which this is done.

In any case it is important to note that the initiation power is only the first step in a referendum, and the potential for elite control remains a significant issue throughout the entire process.

ii. Question-setting: the intelligibility test

A second issue implicit within the elite control syndrome, but also crucial to meaningful citizen deliberation, is question-setting. Does the executive have untrammelled discretion to set a question of its choice? If so, citizens can be presented with a question which is tortuous, leading, and difficult to understand. The importance of a clear question has been recognised by the Venice Commission in its Code of Good Practice which sets out international standards for referendums. This provides that:

‘the question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; electors must be informed of the consequences of the referendum, in particular of the outcome of Yes or No majorities in response to each question; voters must answer the questions asked by Yes, No or a blank vote.’²⁷

A primary lesson to be drawn from the Scottish referendum is that the robust nature of regulation involved in the process was instrumental in helping to ensure a clear question. Fortunately this is an area where the existing UK PPERA regime already has clear strengths, and indeed the PPERA model was influential in the process by which the Scottish question was arrived at.

For over a decade UK referendums have operated on the basis of PPERA, which emerged as a result of the report by the (Neill) Committee on Standards in Public Life.²⁸ PPERA also created the Electoral Commission which was another recommendation of the Neill Committee, and in time the Commission’s supervisory and investigatory powers were extended by the Political Parties and Elections Act 2009. The Commission has various duties, mostly related to funding and spending rules, but PPERA also gives it an important role in overseeing question-setting in referendum processes organised by the Westminster Parliament. Where a Bill which provides for the holding of a referendum is introduced into Parliament, and this Bill specifies the wording of the referendum question, the Commission ‘shall consider the wording of the referendum question, and shall publish a statement of any views of the Commission as to the intelligibility of that question’.²⁹ Notably, the Electoral Commission goes about its task of assessing intelligibility by addressing what people really

²⁷ Venice Commission in its Code of Good Practice CDL-INF(2001)010, para. II, E 2.a. See also Venice Commission, ‘Code of Good Practice on Referendums’ Study No 371/2006 (19 March 2007) COE Doc CDL-AD(2007)008rev, para I, 3.1 c, which contains a similar provision.

²⁸ Neill Report – ‘The Funding of Political Parties in the United Kingdom’ (Fifth Report of the Committee on Standards in Public Life, Chairman: Lord Neill of Bladen), London: H.M.S.O., 1998 (Cm. 4057).

²⁹ Political Parties, Elections and Referendums Act s.104(2).

understand, convening focus groups to test the question empirically, and assessing how well it is understood by people etc.³⁰

PPERA only applies to referendums organised by the Westminster Parliament and so did not regulate the proposed referendum in Scotland. The Electoral Commission as a creature of PERA therefore had no automatic role in relation to the Scottish referendum. Despite this, the terms of PERA acted as an important benchmark for the Scottish Government in drafting the Scottish Franchise Bill and the Scottish Referendum Bill,³¹ and for the Scottish Parliament deliberating upon these. Furthermore, the Scottish Government decided to send its proposed question for review by the Electoral Commission. The Commission acted in line with its PERA role in relation to intelligibility and reported back suggesting a change to the question.³² An already clear question was bolstered by the Commission's recommendation that any 'leading' element be removed. This was accepted by the Scottish Government and this new question was included in the Scottish Referendum Act.³³

This process highlights how regulation in this area not only reins in elite control, it can help facilitate citizens in their comprehension of the issue at stake, offering them a question that is not only clear but also fair and balanced. In this regard UK law is already well placed to regulate question-setting in relation to referendums organised at Westminster. We see another instance of this in the role played by the Electoral Commission in the AV referendum in 2011. Again in this case a change to the question was recommended. The original question proposed by the government was: 'Do you want the United Kingdom to adopt the "alternative vote" system instead of the current "first past the post" system for electing Members of Parliament to the House of Commons?'. But the Electoral Commission took the view that some people, 'particularly those with lower levels of education or literacy, found the question

³⁰ Electoral Commission, 'Referendum on the UK Parliamentary Voting System: Report of views of the Electoral Commission on the proposed referendum question', (The Electoral Commission, 2010), http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/102696/PVSC-Bill-QA-Report.pdf, Electoral Commission, 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question', (The Electoral Commission, 2013) http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf

³¹ The Edinburgh Agreement op. cit. n.6 (para 2) provided: 'Both governments agree that the principles underpinning the existing framework for referendums held under Acts of the UK Parliament – which aim to guarantee fairness – should apply to the Scottish independence referendum. Part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA), provides a framework for referendums delivered through Acts of Parliament, including rules about campaign finance, referendum regulation, oversight and conduct.'

³² The Scottish Government's proposed question was: 'Do you agree that Scotland should be an independent country? Yes/No'. The Electoral Commission took the view that 'based on our research and taking into account what we heard from people and organisations who submitted their views on the question, we consider that the proposed question is not neutral because the phrase 'Do you agree ...?' could lead people towards voting 'yes'.' It therefore recommended the following question: 'Should Scotland be an independent country? Yes/No'. 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question', (The Electoral Commission, 2013) http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf.

³³ Scottish Independence Referendum Act 2013, s.1(2). See also, 'Scottish independence: SNP accepts call to change referendum question', BBC News, 30 January 2013. <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21245701>

hard work and did not understand it'.³⁴ It went so far as to suggest the question be redrafted as follows: 'At present, the UK uses the "first past the post" system to elect MPs to the House of Commons. Should the "alternative vote" system be used instead?'³⁵ And indeed this was the question adopted by Parliament in the Parliamentary Voting System and Constituencies Act for use in the referendum.

Another lesson from this regime, which is applicable particularly in international context, is that the body regulating the question must be truly independent and where the state is a multi-level one, it should enjoy credibility across the state. The legitimacy of the referendum question can be a major issue in a sub-state referendum as we have seen in Canada where the question set in each of the referendums in Quebec in 1980 and 1995 was heavily contested. These questions were written by the Quebec government, were widely considered by the opposition to be obscure and possibly misleading, and were not subjected to a level of independent oversight that was deemed credible by the federal government. The consequence of all of this is an on-going disagreement about how the question-setting process ought to be regulated for any future Quebec referendum. Following the 1995 referendum and the reference to the Supreme Court brought by the federal government,³⁶ the federal Parliament passed a statute seeking to regulate the clarity of the question in any future provincial referendum on secession,³⁷ but its authority to do so was in turn contested by Quebec in a piece of counter-legislation passed by the National Assembly.³⁸ In contrast with this, the credibility of the Electoral Commission across the UK, including the existence of a dedicated Electoral Commissioner for Scotland, helped ensure a level of independent oversight that was recognised and accepted at both Scottish and UK levels.

A third point, however, is that arriving at a clear question is only one step in helping to ensure a deliberative process that enables the informed participation of citizens. Here we need to link the question-setting process back to the initiation power. For example, when we look at the AV referendum the Electoral Commission reviewed the question for its intelligibility, but this in itself did not put before the people the issue of electoral reform in a way that had been subject to full deliberation, laying open the range of possibilities available with which to change the UK system. One consequence of a government having the opportunity to use a constitutional referendum as a political fix is that the issue to be put to the people may not be subjected to thorough and independent scrutiny; instead of a detailed discussion of electoral

³⁴ Electoral Commission, 'Referendum on the UK Parliamentary Voting System: Report of views of the Electoral Commission on the proposed referendum question', (The Electoral Commission 2010), http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/102696/PVSC-Bill-QA-Report.pdf; 'Voting referendum question 'too hard', says watchdog', BBC News website 30 September 2010 <http://www.bbc.co.uk/news/uk-politics-11442445> Accessed 25 February 2013.

³⁵ Electoral Commission, 'Referendum on the UK Parliamentary Voting System: Report of views of the Electoral Commission on the proposed referendum question', (The Electoral Commission 2010), http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/102696/PVSC-Bill-QA-Report.pdf

³⁶ *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217. The Court confirmed that in the event of 'the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada... the other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession... so long as in doing so, Quebec respects the rights of others.' (para 92).

³⁷ Clarity Act 2000: Bill C-20, 2nd sess., 36th Parliament, 48 Elizabeth II, 1999 (as passed by the House of Commons 15 March 2000).

³⁸ *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, Quebec National Assembly, 1st sess., 36th leg. Bill 99 (assented to 13 December 2000).

reform and the opportunity for all of the options to be fully aired, only one model of electoral change, which was the result of a compromise between the Conservative and Liberal Democrat parties and which proved to be difficult to understand and indeed to support, was put to the people.³⁹

One way round this problem would be to introduce a process element, perhaps through an amended PPERA, which provides that when an issue is to be put to referendum, an independent commission of some kind should be charged with investigating the issue and drawing up a question. This could help ensure that the question reflects the type of issues upon which most citizens would consider it appropriate to decide. There are different options here. One way is to give this power to a small group of citizens, another is to have a non-partisan committee draw up the issue to be put to a referendum or even the question itself. The non-elite, popular model was used in British Columbia in 2004 and Ontario in 2006 where groups of ordinary citizens were chosen at random and brought together in citizens' assemblies to decide on whether a referendum should be held on electoral reform and if so what the question should be. In Australia in 1999 a more elite-level constitutional convention was established to prepare for a referendum on the head of state issue. This was partly elected and was also composed of many non-party political figures drawn from civil society. Again both of these models restrict, or in the latter case disperse, elite discretion. There is no guarantee that such models will arrive at the best set of issues to put to the people. Indeed both of these examples have been criticised on precisely that basis, but it seems that introducing an independent step in the process is more likely than either government discretion or inter-party bargaining to arrive at a relevant and legitimate question.

In the end of course regulation of a question can only do so much. The initiation power may be dispersed and the wording of the question may be clear but the issue may well still be very complex as issues of independence and electoral reform inevitably are. This is of course illustrative of the fact that democracy in practice is not a perfect art. Citizens are inevitably presented with a series of complicated issues; in the end, as much in referendums as in ordinary elections, they have to make up their own minds on the basis of the evidence available and their own time and interest in learning about the issues.

iii. Good process: facilitating deliberation

Turning to broader issues of process, what other regulatory steps were taken in designing the Scottish independence referendum to facilitate participation and public reasoning? To analyse this the referendum needs to be broken down into a series of stages: determining the timing of the referendum, the setting of the question, defining the franchise, regulating the campaign and ballot procedure, setting funding and spending rules etc., and also providing for independent oversight of these different components. I will focus here upon franchise, timing and spending rules, each of which is central to either or both of the principles of participation and public reason.

Turning first to franchise, the body of voters in the Scottish referendum was largely uncontroversial. The franchise for the referendum was the same as for Scottish Parliament elections and local government elections,⁴⁰ mirroring the franchise used in the Scottish

³⁹ This can be contrasted with the elaborate way in which New Zealand used referendums to test the popularity of different electoral models: P. Aimer et al, *Toward Consensus?: The 1993 Election and Referendum in New Zealand* (Auckland University Press, 1995), chapter 10.

⁴⁰ Scottish Franchise Act, s.2.

devolution referendum in 1997. It was essentially residence-based which meant that even EU citizens resident in Scotland were able to vote; in this sense, participation of residents was maximised, an important starting point for any republican exercise in popular democracy. One major difference from the 1997 franchise, however, was the provision in the Scottish Franchise Act extending the vote to those aged 16 and 17.⁴¹ This was a radical departure; never before have people under the age of 18 been entitled to vote in a major British election or referendum.⁴² And whatever the merits of this decision, it did serve to extend levels of participation in the process.

The referendum was also very well regulated by a dedicated statute addressing franchise and seeking to maximise the registration of voters. This statute was highly successful. Astonishingly 4,285,323 people (97% of the electorate) registered to vote and in the end 84.7% turned out, the highest figure for any UK electoral event since the introduction of universal suffrage, significantly trouncing the 65.1% who voted in the 2010 UK general election and the 50.6% who bothered to turn out for the 2011 Scottish parliamentary elections. This is even more remarkable when we consider that the franchise was extended to younger citizens which created a significant logistical task for those registering new voters while take care of data protection and other issues in relation to young people.⁴³ This led to the participation of young people who engaged greatly in the referendum process and of whom, one ICM survey suggests, 75% voted.⁴⁴

Participation in the Scottish referendum contrasts sharply with previous UK referendums, in particular with the AV referendum and its turnout of 42.2%.⁴⁵ But it cannot be said that this is a consequence of the energetic registration drive in the Scottish case. People in the UK were already registered for the AV referendum in the same numbers as for any general election. The issue of participation in the independence referendum hinged instead on two clear issues: the subject matter of the vote and timing. The level of debate and subsequent turnout demonstrate that the Scottish referendum raised an issue with which people really engaged. Turnout is of course only one marker of participation. The story we have heard time and again from voters and campaigners alike is that citizens felt greatly empowered by the referendum and the role they had in making such a huge decision. Evidence is emerging of the extent to which people sought out information about the issue at stake and engaged vociferously with one another at home, in the workplace and public spaces and, to an unprecedented degree in British politics, on social media through online newspaper comment sections, Twitter, Facebook, blogs etc.⁴⁶

⁴¹ Scottish Franchise Act, s.2(1)(a).

⁴² Representation of the People Act 1983, s.1(d).

⁴³ Scottish Franchise Act, s.9.

⁴⁴ <http://blog.whatscotlandthinks.org/2014/12/many-16-17-year-olds-voted/>

⁴⁵ The referendum in Wales in 2011, with a turnout 35.4%, also failed to mobilise public interest.

⁴⁶ See Ailsa Henderson et al 'Risk and Attitudes to Constitutional Change', ESRC Scottish Centre on Constitutional Change Risk and Constitutional Attitudes Survey, 16 August 2014: <http://www.futureukandscotland.ac.uk/sites/default/files/news/Risk%20and%20Constitutional%20Attitudes%20Full%20Survey%2014%20Aug.pdf> and AQMen project <https://www.aqmen.ac.uk/project/socialmedia>.

The lesson here is simply that the salience of the issue provoked high citizen participation. This may be another argument against a general referendum law which prescribes referendums for a wide range of constitutional changes. It is perhaps best that referendums be preserved for those issues upon which citizens are most likely to engage, a decision which is best assessed by Parliament on a case by case basis.

The other issue relevant to public engagement was timing. One of the standard criticisms of referendums from the perspective of deliberation is that they are held too hastily without time for proper deliberation of the issues. This was a criticism levelled at the AV referendum. The Parliamentary Voting System and Constituencies Act 2011 received Royal Assent on 16 February 2011 and the referendum was held on 5 May 2011. This did not allow much time for public education on such a complex issue. Clearly this was not a problem in the Scottish context where the referendum was proposed some 33 months before it was held and where both campaigns had almost two years from the conclusion of the Edinburgh Agreement to explain their respective cases to the voters.

The regulation of timing helps to delimit elite control. The Scottish Government had considerable discretion as to the date of the referendum, but this was also regulated by the Edinburgh Agreement which provided that a single-question referendum had to be held before the end of 2014. Subsequent legislation which fixed the date also gave certainty to both campaigns and to citizens as to when the referendum would take place. In other situations elites have changed the date. This happened in Quebec in 1995 where the referendum date was moved from June to October to offer the nationalists a better chance of victory. Once the Scottish date was fixed in law it would have been politically unacceptable for the Scottish Government to seek to change it.

Again what lessons can be drawn for the UK? The length of the process facilitated deliberation by giving people time to learn about, reflect upon and deliberate with others over the issues at stake. It is of course unrealistic for such a lengthy period to be given ahead of every referendum, but for complex issues citizens do need time to learn about the consequences of their vote, in a way that was difficult in the short AV referendum campaign.

Funding and spending is also a central part of any electoral event. One of the main criticisms of referendums, particularly in the American context, is that they can be the subject of widely distorted campaign expenditure, with voters subjected to heavily disproportionate advertising from one side in the campaign.⁴⁷ This serves to unbalance the environment within which citizens are expected to deliberate. Particular risks occur in the period immediately prior to a referendum when campaigning becomes more intense, with the concomitant risk of misinformation being fed to the public to an extent which makes meaningful citizen deliberation very difficult if not impossible. It seems clear, therefore, that the deliberative potential of a referendum rests largely upon the existence of a level playing field in relation to campaign expenditure. In particular, efforts should be made to ensure that voters do not suffer from the distortions of vested interests, including big business, in their attempts to make sense of the issue they face.

The law governing referendums organised by Westminster already provides a detailed regime which seeks to meet these goals, and in forming the backdrop to the Scottish referendum it was a regulatory model which did indeed help create the conditions for the free flow of

⁴⁷ D. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (Harcourt, 2000).

information to and among citizens with influence by each campaign operating in a fairly even way. The United Kingdom legal regime, through PPERA, designates a ‘campaign period’ within which strict spending rules apply.⁴⁸ This is a serious attempt to reregulate funding and spending with a view to fairness between the campaigns, while allowing for these rules to be tailored further from referendum to referendum. It contains a highly elaborate set of financial provisions, and in fact the degree of elaboration has come in for some criticism.⁴⁹ The fact that the Electoral Commission oversees the setting and implementation of these spending and funding limits, as well as other aspects of the process, also goes a long way to satisfying crucial conditions for effective deliberation.⁵⁰

Building upon the UK regime, the Scottish Referendum Act sought to ensure equality of arms between the two campaign groups. In giving effect to this aim it also modified the PPERA regime in a way that may well be instructive for future UK referendums. Each side in the campaign was able to apply to the Electoral Commission to be appointed as one of two ‘Designated Organisations’ – a status which can entail some benefits in terms of the provision of public facilities to hold meetings etc. – and both the Yes Scotland and Better Together campaign groups intimated their respective intention to do so. They were designated as such in April 2014.⁵¹ Notably the Act sought to deal with a criticism of PPERA relating to designation. PPERA does not permit the Electoral Commission to designate only one campaign organisation; either both (or more) must apply for designation or neither can.⁵² In the referendum in Wales in 2011 the No campaign ‘True Wales’ did not apply, which led to a criticism that this was ‘gaming’, to prevent the Yes campaign from attracting public funding and the other benefits of designation.⁵³ By contrast, the Scottish Referendum Act allowed for designation by one side alone,⁵⁴ thereby avoiding this problem. In the end this was not an issue in practice as the two campaigns applied for official status, but it does illustrate that the Scottish Parliament addressed PPERA in detail and was keen to adopt its advantages and tinker with its potential disadvantages. In light of the Welsh experience, there may well be a case to amend PPERA ahead of any future UK-wide referendums.

⁴⁸ PPERA s.102.

⁴⁹ N.S. Ghaleigh, ‘Sledgehammers and Nuts?: Regulating referendums in the UK’ in K. Gilland Lutz and S. Hug (eds), *Financing Referendum Campaigns* (Palgrave Macmillan, 2009).

⁵⁰ See the final Electoral Commission report on the Scottish referendum process: Electoral Commission, ‘Scottish Independence Referendum Report on the referendum held on 18 September 2014’, December 2014 <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/referendums/scottish-referendum>

⁵¹ ‘Electoral Commission designates ‘Yes Scotland’ and ‘Better Together’ as lead campaigners at Scottish Independence Referendum’, Electoral Commission news release 23 April 2014 <http://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-referendums/electoral-commission-designates-yes-scotland-and-better-together-as-lead-campaigners-at-scottish-independence-referendum?>

⁵² Political Parties, Elections and Referendums Act 2000 s.108.

⁵³ Richard Wyn Jones’ evidence before the Referendum (Scotland) Bill Committee, 9 May 2013. See also S. Tierney and S. Suteu, ‘Towards a Democratic and Deliberative Referendum?: Analysing the Scottish Independence Referendum Bill and the Scottish Independence Referendum (Franchise) Bill’, ESRC Report, 21 August 2013.

⁵⁴ Scottish Independence Referendum Act, sched.4, para 5(3).

Another difference from the PPERA model is that the Scottish Referendum Act did not provide for any public funding for designated organisations. This again was a conscious departure from PPERA which does offer grants to designated organisations.⁵⁵ The decision not to fund the 2014 referendum was a political one taken by the Scottish Government. It did not lead to any opposition within the Scottish Parliament, nor by either of the two main campaign groups, perhaps because both campaigns expected to be amply funded by private donors. Again the UK Parliament is probably wise to assess this case by case in future. If one campaign is very under-funded then there may well still be an argument for public funding so that both sides of the issue can be presented to the public.

Turning to the rules in detail, a ‘Campaign Rules’ provision within the Scottish Referendum Act created a regulatory regime through which funding, spending and reporting were administered.⁵⁶ This is generally in line with standard PPERA rules. A ‘Control of Donations’ provision⁵⁷ indicates what types of donations were allowed and what constituted a ‘permissible donor’.⁵⁸ Under these provisions an application must be made for this status. There were also reporting requirements which meant that reports on donations received required to be prepared every four weeks during the referendum period (Schedule 4, para 41).

It is instructive to explain how the spending rules operated in achieving a level playing field. Within the Scottish Referendum Act there were four categories of actor entitled to spend money during the campaign period: Designated Organisations (which could each spend up to £1,500,000) (Schedule 4, para 18(1)); political parties as ‘permitted participants’ (Schedule 4, para 18(1)); other ‘permitted participants’ who could spend up to £150,000 (Schedule 4, para 18(1)); and any other participants spending less than £10,000, which means they did not require to register as permitted participants.

The Scottish Referendum Act also defined ‘campaign expenses’. These included campaign broadcasts, advertising, material addressed to voters, market research or canvassing, press conferences or media relations, transport, rallies, public meetings or other events. Again this is all in line with PPERA as were the detailed rules on reporting of expenditure (Referendum Act, Schedule 4, paras. 20-24).

These rules in practice led to a fairly even distribution of expenditure between the two campaigns. For example, the total spending limit for the two pro-independence parties (SNP and Greens) was almost equal to that for the three unionist parties – Labour, Conservative and Liberal Democrat. It should also be observed that these rules reflect the spending limits recommended by the Electoral Commission⁵⁹ by which they were overseen, and which issued

⁵⁵ Political Parties, Elections and Referendums Act 2000 s.110.

⁵⁶ Scottish Referendum Act, section 10 and Schedule 4.

⁵⁷ Schedule 4, Part 5.

⁵⁸ Schedule 4, para 1(2).

⁵⁹ ‘Electoral Commission advice on spending limits for the referendum on independence for Scotland’, Electoral Commission, 2014 http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/153697/Report-on-spending-limits-for-the-referendum-on-independence-for-Scotland.pdf

statements on the four weekly reports.⁶⁰ The Electoral Commission showed itself prepared to intervene to ensure that the registration and spending rules were fully complied with.⁶¹

The Scottish referendum did achieve equality of arms. In future UK referendums, however, this would vary from referendum to referendum given the ability of parties to spend money based in proportion to its success at the preceding General Election. If more than one main party supports or opposes a particular proposition then spending is likely to be heavily imbalanced. This could be perceived as a problem, but there is a justification for this based upon the popular support expressed for those parties at the previous election which provides the parties in question with a particular legitimacy as campaign voices.

In the end the Scottish referendum demonstrates the effectiveness of the PPERA regime, and its flexibility and adaptability to different conditions. The existence of a detailed statute which provides general rules on various aspects of the referendum process and its regulation and oversight, which can then be supplemented with a specific piece of legislation for the referendum in question, allowing for modification of the spending and related rules to suit the situation in question, offers a rigorous but in some ways highly adaptable regime. Once again the Scottish referendum also showed that the Electoral Commission's role is crucial, both in advising on modifications to PPERA and in overseeing the rules put in place.

IV. Conclusion

Referendum democracy is not without its challenges. In particular, the history of the referendum does highlight many situations where elite control combined with a lack of citizen engagement has served to make direct democracy an easily manipulable device by a government seeking to bypass the legislature to achieve its policy preferences.

I have argued however that these objections are problems of practice not principle. What is crucial is adequate regulation both to control the discretion of elites, in particular the government of the day, and to facilitate the full and free engagement of citizens. This can be done by legal controls in areas such as independent oversight of question-setting, guidelines on referendum timing and campaign length, franchise rules, and laws regulating funding and expenditure.

The Scottish referendum is different from standard UK referendums in that the two governments each had an element of control over the process. At the level of UK referendums organised by Whitehall this level of dispersed control does not apply, which puts a particular responsibility on Parliament to ensure that referendums are held only for principled reasons and that the process rules are adequate to allow for citizen engagement. To this end the PPERA regime was tested in the Scottish campaign, and came through successfully. And as I have sought to show, there are lessons from this in terms of question-setting, independent oversight and spending rules which should inform how PPERA is

⁶⁰ 'First pre-poll donations and loans report at Scottish Independence Referendum published', Electoral Commission news release, 8 July 2014; 'Second pre-poll donations and loans report at Scottish Independence Referendum published', Electoral Commission news release, 5 August 2014.

⁶¹ 'Electoral Commission voids CBI listing as no campaigner in Scotland vote', *The Guardian*, 1 May 2014; 'Electoral Commission statement on the CBI Scotland's annual dinner', Electoral Commission, 27 August 2014 <http://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-referendums/electoral-commission-statement-on-the-cbi-scotlands-annual-dinner>.

applied to future referendum events and how it might be amended, in particular to introduce some measure of independence to the issue-framing and question-setting processes.

In the end of course, there is only so much that legal regulation can do to facilitate deliberation. Much must ultimately depend upon the quality of debate within civil society and the engagement of the private media. Also the British referendum experience shows that a crucial issue is whether the issue matters to citizens. So much of the success of the Scottish referendum came down to the fact that citizens used the level playing field provided by the regulatory structure to really engage with the issue and to turn out to vote in great numbers in a way that simply did not occur with either the AV or Welsh referendums of 2011.

This suggests that it would be ill-advised to pass a referendum statute that seeks to prescribe precisely those issues upon which referendums ought to be held. It is for Parliament to assess those issues of greatest salience both to the constitution and to voters which are suitable to be put to referendum, case by case and in light of prevailing circumstances. We are seeing this emerge gradually in the context of devolution to Wales and Northern Ireland, and also in relation to constitutional changes at the European Union level. What seems certain is that the referendum as a feature of UK constitutional change is here to stay. On that basis the lessons of the Scottish referendum should be taken very seriously as Britain confronts a future in which the people will have a significantly greater say in processes of constitutional change.